IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 257 and 258

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, AND AMERICAN SOCIETY OF TRAVEL AGENTS, INC.,

Petitioners,

—against—

AKTIEBOLAGET SVENSKA AMERICA LINIEN (SWEDISH AMERICAN LINE), et al.,

Respondents.

REPLY BRIEF FOR PETITIONER AMERICAN SOCIETY OF TRAVEL AGENTS, INC. ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CASES CITED

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Petitioner, American Society of Travel Agents, Inc. ("ASTA"), submits this brief in reply to respondents' brief in opposition to the separate petitions for a writ of certiorari filed by the Solicitor General on behalf of the Federal Maritime Commission and the United States of America (No. 257) and by ASTA (No. 258).

Respondents contend that the petitions herein are untimely because they were filed more than 90 days after entry

of the first judgment (June 10, 1965) of the court below,* which judgment respondents claim is the one petitioners should have challenged.** This contention is without merit.

The first judgment of the court below, which remanded this case to the Commission for reconsideration with directions to make additional findings or modify those that had been made, did not "put to rest the questions which the parties had litigated" in that court, *Federal Trade Commission* v. *Minneapolis-Honeywell* Co., 344 U. S. 206, 213 (1952), and therefore could not have been the proper object of a petition for writ of certiorari. Had petitions for certiorari been filed following that judgment, respondents would surely have contended that they were premature; and they would have been correct. *See United States* v. *Adams,* 383 U. S. 39, 41-42 (1966); *Federal Trade Commission* v. *Minneapolis-Honeywell Co., supra* at 215-216 (dissenting opinion) (citing cases).

The court below said in its first opinion that it could not then make a final determination of the questions presented by the inconclusive Commission report. "By the first judgment it [the court below] did no more than keep the Commission within the bounds set by its opinion." *Federal Power Commission* v. *Idaho Power Co.,* 344 U. S. 17, 20 (1952). The court below called for the Commission to make new findings. With respect to the unanimity rule, the court below asked the Commission

> "* * * either to make supporting findings which adequately sustain the ultimate finding that the

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*28 U. S. C. 2101(c) provides in pertinent part:

> "Any * * * writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

**Respondents do not claim, nor could they, that the petitions are untimely with respect to the second judgment (January 19, 1967). *See* ASTA Petition (No. 258), p. 2.

> unanimity rule operates to the detriment of the commerce of the United States, or, if this cannot be done to vacate that ultimate finding and approve the contract in this respect." (App. B, 74)

and with respect to the tieing rule, the court below directed

> "* * * that either an adequately supported ultimate finding be made which warrants disapproval under the statute, or if no such finding can be made on the record, that the tieing rule be approved as directed by 46 U. S. C. § 814." (App. B, 77).

Petitioners could not reasonably have been expected to seek review of that decision. *Cf. Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U. S. 374, 383-84 (1965). On remand, the Commission might have made the findings requested by the court below or reversed itself with respect to either or both the unanimity rule and the tieing rule. *Cf. Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145-146 (1940). Indeed, on remand the Commission *did* reconsider the record and *did* make new findings.*

Although, in retrospect, the first opinion of the court below may have suggested disagreement with the legal standards applied by the Commission, such disagreement was not decisively articulated by the court below until its second opinion, in which the legal questions which petitioners have asked this Court to review were finally decided. For example, in its first opinion the court below, considering the applicability of antitrust principles to the public interest test of the Shipping Act, said (App. B, 76):

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*Respondents' Comparative Table (Resp. Br. App. B) inexplicably omits many of these new findings which are discussed in ASTA's brief to the court below (pp. 7-20).

> "We do not read the statute as authorizing disapproval of an agreement on the ground that it runs counter to antitrust principles, the theory on which *seemingly* the Commission's disapproval rests here. * * *" (Emphasis added.)

Certiorari was not appropriate until the court below knew exactly what the Commission's "theory" was (not what it "seemingly" was) and had ruled on it. The necessity for clarification by both court and Commission and the absence of a final determination are further illustrated by the inconsistency between the text of the court's first opinion set forth above and its accompanying footnote (App. B, 77):

> "This is not to say of course that the Commission must completely separate itself from antitrust principles * * *."

Respondents now contend that the views of the court below as to the applicability of antitrust principles are those set forth in the *footnote,* rather than the *text* (to which they make no reference) and that such views were ripe for review in 1965 (Resp. Br. 11-12, 15-18). They cite ASTA's brief below for this proposition; but ASTA's efforts to harmonize the text and the footnote were rejected by the court below in its second opinion and (regretfully) cannot be said to rise to the status of authority.

Not until its second opinion did the court below actually (a) preclude the Commission from considering antitrust principles in applying the Shipping Act's public interest test, (b) disregard applicable standards of judicial review and substitute its conclusions for the Commission's findings, and (c) avoid formulation, or even consideration, of the independent ground for an affirmance of the Commission's decision urged upon it by petitioner.

It is clear therefore that it only became appropriate for petitioners to seek review in this Court following the second judgment of the court below. For that judgment did not merely reenter or revise in "an immaterial way" or reiterate "without change, everything which had been decided" in the first judgment. *Federal Trade Commission* v. *Minneapolis-Honeywell Co., supra* at 211-212. It was the second judgment which finally determined the issues involved and brought the proceedings in the court below to a conclusion.

For the reasons set forth above, and in the petitions filed herein, the petitions for a writ of certiorari should be granted.

Dated: New York, N. Y.
September 20, 1967

Respectfully submitted,

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